view on a proper reading, the will clearly specified for a *per capita* distribution.

The answers to the questions of the trustee are therefore these:

(a) Thor Keng Seng and Thor Keng Hock are the lawful male issue of Thor Teng Eng, within the meaning of clause 10 of the will and

(b) the nett residuary estate is to be divided among Thor Keng Hong, Thor Keng Seng and Thor Keng Hock equally.

I will now hear arguments as to costs.

*Order accordingly.*

Solicitors: *G. H. Goh & Co.; Ong Huck Lim & Co.; S. Thillaimuthu & Co.*

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## PUBLIC PROSECUTOR v. TAN ENG HOCK

**[A.Cr. J. (Abdul Aziz J.) July 21, 1969]**

**[Kuala Lumpur — Criminal Appeal No. 36 of 1969]**

*Penal Code, s. 379 — Theft of motor car — Sentence — Principles guiding.*

*Criminal Law and Procedure — Sentence — Principles guiding — Sentence of binding over — Criminal Procedure Code (Cap. 6) ss. 173A & 422.*

The respondent was charged with the theft of a motor car to which he pleaded guilty and on his plea he was convicted and bound over under section 173A of the Criminal Procedure Code (Cap. 6). The Public Prosecutor appealed.

**Held,** allowing the appeal: (1) an order of a binding over under section 173A of the Criminal Procedure Code after recording a conviction is illegal and the defect cannot be cured by section 422;

(2) having regard to the number of cases of car theft, a sentence of binding over is neither appropriate nor relevant enough. Sentence varied to 18 months' imprisonment.

MAGISTRATES' CRIMINAL APPEAL.

*Mokhtar bin Sidin* (Deputy Public Prosecutor) for the appellant.

*Joginder Singh* for the respondent.

**Abdul Aziz J.** (delivering oral judgment): The respondent was charged under section 379 of the Penal Code with theft of a motorcar valued at $4,800 belonging to one Yap Chai Leong. To that charge, he pleaded guilty and on his plea of guilty he was convicted and bound over under section 173A of the Criminal Procedure Code to be of good behaviour and to keep the peace for one year.

The facts of the case as given by the prosecuting officer are:

On 24th February 1969 at 7 p.m., the owner of the car, one Yap Chai Leong, parked his car in front of the Lido Cinema, Klang, to see a show. When he came out of the cinema, he found that somebody had stolen his car. He therefore lodged a report. On 29th March 1969, about a month after the theft of the car, the police laid an ambush near the Cathay Cinema. On the same evening, the accused was seen driving the stolen car. He was arrested and it was found that the car was carrying a false number plate.

The accused admitted the facts of the case. The learned trial magistrate in assessing sentence took into account the fact that the accused was a first offender and that he has a wife and a child and aged parents to support. He therefore bound the accused over under section 173A of the Criminal Procedure Code. Manifestly, an order of a binding over under section 173A of the Criminal Procedure Code after recording a conviction is illegal and the defect cannot be cured by section 422 of the Criminal Procedure Code as urged by the respondent's counsel. The order of binding over must, therefore, be quashed.

Having quashed the sentence, what is the appropriate sentence to be imposed by this court? I am aware that in considering the appropriate sentence the court should always be guided by certain principles: the first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing a crime but also of preventing it. In fixing sentence, the nature and the circumstances and the degree of deliberation must be taken into account. When there is no deliberation and the accused has a good record of antecedent, age and character, a bond would be justified. Apart from the fact that respondent is a first offender, there are no mitigating factors in the case. The accused was 28 years of age at the time of the commission of the offence. The fact that he was arrested a month after the offence was committed and that he had changed the number plate shows that this was a deliberate act and not an impulsive act of bravado. Car theft is a fairly common offence and invariably it leads to more serious crimes. It is manifest, having regard to the number of such cases, that a sentence of binding over is neither appropriate nor relevant enough. The appeal is, therefore, allowed and the sentence shall be varied to 18 months' imprisonment.

*Appeal allowed.*

Solicitors: *Joginder Singh & Co.*

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## ALI AMBERAN v. TUNKU ABDULLAH

**[O.C.J. (Raja Azlan Shah J.) January 9, 1970]**

**[Kuala Lumpur — Election Petition No. 6 of 1969]**

*Elections — Election handbills — Causing to be printed election handbills or advertisements which do not bear name and address of printer — Whether candidate liable for acts of members of political party setting up candidate — Extended scope of agency — Corrupt practices — Election Offences Act, 1954, (Revised 1969) ss. 3(m) & 11(1)(c).*

*Agency — Extended scope of — Election law — Acts of members of political party.*

The petitioner sought to avoid an election on 3 grounds: (1) corrupt practice was committed in causing to be printed election handbills or advertisements without the name and address of the printer; (2) illegal practice was committed in

printing a reproduction of ballot paper; (3) the recount of votes was not conducted in accordance with the principles laid down in the Elections (Conduct of Elections) Regulations, 1959.

**Held:** (1) under the rule of extended scope of agency which holds good in our election law, a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election may aptly be regarded the "agents" of the candidate for election purposes and in this case the candidate was therefore liable for the acts of the secretary of the Alliance branch and was therefore guilty of corrupt practices for causing to be published the election advertisement cards which did not bear the name and address of the printer thereof;

(2) on the facts the candidate did not print the cards with the reproduction of the ballot paper and he was therefore not liable for illegal practice under section 3(m) of the Act;

(3) on the facts there was no evidence to show that the recounting was improper and therefore the petition failed on this ground.

**Editorial Note:** As a result of the finding that the respondent was guilty of an offence under section 11(1)(c) of the Election Offences Act, 1954 the Attorney-General was given an opportunity to be heard and after hearing the learned Election Judge made a report under section 28 exonerating the respondent and issued a certificate under section 36 of the Act. The Report of Excuse and the Certificate are reproduced at end of the judgment as Appendix A and B respectively.

*Cases referred to:-*

(1) *James* v. *Smee* [1954] 3 All E.R. 273, 277.

(2) *Sefton* v. *Tophams Ltd.* [1967] A.C. 50, 67, 68.

(3) *McLeod (or Houston)* v. *Buchanan* [1940] 2 All E.R. 187.

(4) *Kelly's Directories Ltd.* v. *Gavin & Lloyds* [1902] 1 Ch. 631, 634.

(5) *Wakefield case* (1874) 2 O'Mal. & H. 102.

(6) *Taunton case* (1869) 1 O'Mal. & H. 181, 182.

(7) *Nani Gopal Swami* v. *Abdul Hamid Chaudhary* 19 E.L.R. 175.

(8) *Triloki Singh* v. *Shivrajwati Nehru* 15 E.L.R. 234.

(9) *Amritsar South (Sikh) Constituency* 1937 Doabia (I) 92.

(10) *Southern Towns (Mohammadan)* 1949 Doabia (I) 310.

(11) *Sudhir Laxman* v. *S.A. Dange* 17 E.L.R. 373.

(12) *Westminster case* (1869) 1 O'Mal. & H. 89.

(13) *Stepney case* (1892) O'Mal. & H. 35.

(14) *N. Pethu Reddiar* v. *V.A. Muthiah & Anor.* A.I.R. 1963 Mad. 390.

(15) *Tribeni Ram* v. *Satya Deo Singh* A.I.R. 1966 All. 20.

ELECTION PETITION.

*O. L. Phipps* (*A. Rajadurai* with him) for the petitioner.

*Dato' Athi Nahappan* for the respondent.

*Shiv Charan Singh* (Senior Federal Counsel) watching brief.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** This is an election petition against the respondent who was the successful candidate at the recent general election for the Parliamentary Constituency of Rawang. The petitioner is not the unsuccessful candidate but a voter and active member of the Gerakan Rakyat party.

It is sought to avoid the election on 3 grounds: —

(i) That corrupt practice was committed in connection with the said election by the respondent or with his knowledge or consent or by any agent of the respondent by printing, publishing, distributing, posting up or causing to be so printed, published, distributed or posted up before and during the said election handbills and/or advertisements which referred to the said election and did not bear upon its face the names and addresses of its printers and publishers contrary to section 11(I)(c) of the Election Offences Act, 1954 (Revised 1969).

(ii) That illegal practice was committed in connection with the said election by the respondent or with his knowledge or consent or by any agent of the respondent by printing, publishing, distributing, posting up or causing to be so printed, published, distributed or posted up before and during the said election handbills and/or advertisements which contained reproduction of what purports to be a ballot paper to be used or likely to be used at such election with the symbol of the respondent's Alliance party and the purported symbol of the Gerakan Rakyat party contrary to section 3(m) of the said Act.

(iii) That the recount of votes made under regulation 25(8) of the Elections (Conduct of Elections) Regulations 1959 was not conducted in accordance with the principles laid down in the said Regulations and was thus void, invalid and/or a nullity and that such non-compliance affected the result of the election.

The petitioner now prays: —

(a) That G. T. Rajan, the unsuccessful candidate ought to have had or had a majority of lawful votes, and that a scrutiny and/or a recount be ordered.

(b) A declaration that the said G. T. Rajan was duly elected and ought to have been returned.

(c) A declaration that Tunku Abdullah, the respondent was not duly elected or ought not to have been returned, and/or

(d) A declaration that the election is void.

I will now consider the various allegations in their chronological order.

1. *The allegation of corrupt practice under section 11(1)(c) of the Election Offences Act.*

It is not disputed that on the evidence 7 cards were found to be in circulation. They did not bear on their surface the names and addresses of the printer and the publisher as required by section 11(1)(c) of the Act.

The respondent's story is this. On 17th or 18th April 1969, he visited the Alliance office at Rawang. To his annoyance he discovered that the Alliance secretary of the Rawang Branch, Enche Kamaruddin bin Buyong, had caused to be printed 2,500 copies of the impugned cards and had distributed 1,500 to the various sub-branches. That gentleman is not the respondent's electoral agent. I accept the respondent's words that he had given specific instructions that any advertisement, handbills, stickers and any other docu-

ments issued by the party must bear the printers' and publishers' name. The uncontroverted fact that all publications, e.g. booklets, circulars and rubber-stamped documents bearing names and addresses of the printers and publishers is consistent with and lends support to the respondent's evidence. I further accept that the impugned cards were printed without his knowledge and consent and that he was indisposed prior to that date. Any subsequent knowledge of the publications cannot be relevant for the purpose of determining the consent of the candidate prior to the publication. He personally directed the destruction of the remaining copies which were in the office. He then directed the secretary to print a set of similar cards with the name and address of both the printer and publisher. He thought these copies did not violate the provisions of the Act.

It may be noticed at once that these cards bear upon their surface the symbol of two political parties namely, that of the Alliance and below it that of the Gerakan party. That is a reproduction of a ballot paper and thus offends the provisions of section 3(m) of the Act. These cards were subsequently distributed to the sub-branches on or about 24/25th of April 1969. Later the respondent found that these cards offended the election law and he therefore gave instructions for their destruction. That was done although a few were not recovered.

It is of significance to note that the primary purpose of the diverse provisions of the election law which may at first-hand appear to be technical is to safeguard the purity of the election process and the courts will not in ordinary circumstances minimise their operation. It is the concern of the courts to purge elections of all kinds of corrupt or illegal practices so as to protect the political rights of the citizens and the constituency.

Now an allegation of corrupt practice is of a quasi-criminal nature in as much as a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove it beyond reasonable doubt by evidence which is clear and unambiguous.

On the evidence Messrs. Jenson Press printed the offending cards; the respondent could only have "printed" them if they were being printed by Messrs. Jenson Press as his servants or agents, in the course of his business. (See *James* v. *Smee*).[1] No such connection between the respondent and Messrs. Jenson Press has been proved.

The petitioner had, therefore, to fall back upon the words "cause to be printed". To cause a thing to be done is the same thing as to be the *causa causans*. *Causa causans* is the real effective cause as contrasted with the *sine qua non* which is merely an incident which precedes in the history or narrative of event. (See *Sefton* v. *Tophams Ltd.*[2]). Putting it in a simplified form, to "cause to be printed" involves some express or positive mandate from the person "causing" to the other person, or some authority from the former to the latter, arising in the circumstances of the case. (See *McLeod (or Houston)* v. *Buchanan*[3]).

It is not disputed that the order to print the offending cards was given by Enche Kamaruddin. In that sense Enche Kamaruddin caused those cards to be printed by Messrs. Jenson Press. Messrs. Jenson Press were his "agents". If it could be shown that the respondent and Enche Kamaruddin had a common interest or "partners or joint-adventurers" in "causing" the cards to be printed, the fact that Messrs. Jenson Press were the "agents" of Enche Kamaruddin would render them also the "agents" of the respondent as would make the latter liable for "causing" those cards to be printed. (See *Kelly's Directories Ltd.* v. *Gavin & Lloyds*[4]).

What is a common interest must in the last analysis depend upon the circumstances of each case. A case of common interest is where an agent pursues an act for the benefit of his principal. In that context it is said that both the principal and the agent have a common interest in the subject matter of the act. This point revolves itself into a nice question as to the meaning of "agency" in election law.

English parliamentary election law has been the source from which our election law is modelled and therefore it will not be incorrect for this court to receive from it the inspiration and guidance in interpreting our law, in particular the rules and tests laid down in English cases with regard to "agency". In English election law the definition of "agency" has been given a very wide scope and two quotations from English judges would suffice to show clearly the relationship:

"By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority ... But if that construction of agency were put upon acts done at elections, it would be impossible to prevent corruption. Accordingly a wide scope has been given to the term." (See *Wakefield case*[5]).

In *Taunton case*[6] Blackburn J. remarked:

"The rule of law has long been established that in parliamentary matters we are not to consider the strict rule of common law agency ... it has long been established that where a person has employed an agent for the purpose of procuring his election, he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend it or authorise it but even *bona fide* did his best to hinder it."

It will thus appear that the law of agency in English election matters goes so far that a candidate may be made responsible even for acts done by the agent in defiance of his instructions.

In India too wherever the question of agency has arisen, reference to English election law has been made with approval and the rule of extended scope of agency has been followed. Thus an "agent" includes not only a person who has been specifically engaged by the candidate or his election agent to work for him at the election but also a person who does in fact work and whose services have been accepted by the candidate. (See *Nani Gopal Swami* v. *Abdul Hamid Chaudhary*[7]). In the case where a candidate has been set up by a party, that party and members and officials thereof have been held to be the candidate's agents because by agreeing to stand as a candidate of that party, he must be deemed to have agreed to the party and its prominent members working to promote his

election. (See *Triloki Singh* v. *Shivrajwati Nehru*[8]). In that case it was further held that if a Minister who is a prominent member of the Congress, works actively for the success of a party candidate, with the knowledge and approval of the candidate, he can be treated as agent of the candidate. In *Amritsar South (Sikh) Constituency, 1937*[9] it was held that the publication of posters by a prominent member of a party who sets up the respondent as a candidate was by an agent of that candidate. In *Southern Towns (Mohammadan), 1949*[10] the respondent had contested on the Muslim League ticket. The League and its secretary were held to be agents of the respondent in arranging meetings and processions. In *Sudhir Laxman* v. *S. A. Dange*[11] it was held that election committee members of a party forming an election committee for propaganda purposes must be deemed to be the agents of the candidate.

Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; any other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not and would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded the "agents" of the candidate for election purposes.

Reverting to the present case it is on record that Enche Kamaruddin was not the electoral agent of the respondent. He was since 1967, the secretary of the Alliance Rawang Branch. In that capacity he had actively worked for the success of the respondent and party and in that direction he caused the offending cards to be printed in order to promote the respondent's election. It can also be inferred that the respondent had employed or authorised him to do the election work for the party and the candidates in the Rawang Constituency at Federal and State levels and the fact that Enche Kamaruddin had acted beyond the scope of his authority is not a valid defence and it was this aspect of it on account of which this law of agency in election was described in the *Westminster case,*[12] as

"a stringent law, a harsh law; it makes a man responsible who has directly forbidden a thing to be done by a subordinate agent."

On these facts and under the circumstances of the case I am satisfied that the respondent is guilty of corrupt practices under section 11(1)(c) of the Act.

2. *The allegation of illegal practice under section 3(m) of the Election Offences Act.*

Section 3(m) enacts:

"Any person who prints any advertisement, hand-bill, placard or poster, which refers to an election and contains a reproduction of a ballot paper, or of what purports to be a ballot paper, to be used or likely to be used at such election shall be liable to imprisonment...."

It seems to me that the words "Any person who prints" give the key to the true construction of the sub-section. That sub-section imposes a penal liability to any person who violates its provisions. Therefore, in accordance with the canon of statutory interpretation it must be strictly construed, that is, the language therein cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the Act as a whole was enacted. Applying this test it is plain that this particular sub-section was designed to enforce obedience to the mandates of the law by punishing the printers who disregard its provisions. It is specifically directed against the person who "prints" but not against those who "cause to be printed." The manifest distinction between the language used in this section and that used in section 11 cannot also be overlooked.

On the evidence I am satisfied that the respondent did not print those offending cards. In my view, this ground is misconceived.

3. *Recount and/or scrutiny:*

I have already dealt with this issue on interlocutory application and have dismissed it on the facts. I have now been asked to reopen the issue on additional facts, which for unexplained reasons were not advanced at the earlier hearing although they were not unavailable then. I see no compelling reason why I should not reconsider this issue on new facts.

It is on record that on the first count the respondent polled a majority of 275 votes and since the difftrence was less than 2% of the total number of votes cast a recount was granted at the request of the unsuccessful candidate. (See regulation 25(8)(b) Elections (Conduct of Elections) Regulations, 1959). On the recount a total of 25 votes were retrieved thus reducing the respondent's majority to 250 votes. The respondent was declared elected.

The petitioner now says that had there been a proper recount, the unsuccessful candidate would be the person to secure a majority of lawful votes. To substantiate this point, he listed various irregularities and illegalities in the conduct of the recount.

Before I proceed to state the precise grounds on which the irregularities and the illegalities are rested, certain matters have to be mentioned.

Simultaneously with the Parliamentary Election, the State Assembly Election was also held. There was one returning officer. At the time of the counting of votes the Alliance candidate had 15 counting agents and the Gerakan Rakyat 14. Besides, the election agent of each candidate as well as the candidates themselves were present. In all, including invited guests, there were about 30-40 people in the counting hall.

The counting of votes for the Parliamentary seat commenced at about 9.00 p.m. on 10th May 1969. The ballot papers of each candidate were mixed and then sorted out and tied up in bundles of tens and tens into bundles of hundreds. The counting was completed at about 2.00 a.m. on 11th May 1969. No complaint was made in respect of the counting. A recount was ordered and that was completed at about 5.00 a.m. On the recount each candidate's votes were

placed in five separate baskets and these baskets were in turn placed on two separate tables.

Before I consider the petitioner's case I would like to put on record the following. The returning officer and the counting clerks were drawn from various Government departments and although some suggestion was made before this court that they had rigged the election process, that charge has not been made out or persisted in. There can be no presumption that these officers commit irregularities. I am quite satisfied that all these officials were doing the best possible thing in difficult circumstances and in my judgment no blame of any kind rests on them.

The petitioner's case is based on two limbs. First, it is said that on the recount the votes were counted from the bundles of tens; the bundles were never untied and re-mixed, there was no resorting and therefore the method adopted violates the procedure prescribed in the '*Pegawai Pengurus*'. That is the illegality alleged by the petitioner.

His case rests solely on the evidence of the unsuccessful candidate and his counting agents Mohamed Yunus bin Abdul Rani. The respondent admitted that there was no re-mixing and re-sorting but said that an agreement was reached between him and the unsuccessful candidate with the consent of the returning officer that the ballot papers could be re-counted from the bundles of tens. The returning officer was subpoenaed by the petitioner and in fact he was in court throughout the whole proceedings but he was never called to the witness-box.

The vital question to be answered is whether omission to re-sort the ballot papers violates the provisions of the election law thus rendering the election void and a nullity. It is manifest that the conduct or method to be adopted on a recount must be regarded as having been exhaustively dealt with by the Elections (Conduct of Elections) Regulations, 1959 (L.N. 69/1959). Regulation 25(8) gives power to the returning officer to order a recount on the application of either candidate or election agent. In any event he has a discretion to order a recount or recounts to satisfy himself as to the correct result of the poll. However, the regulation is silent as to the method to be adopted on a recount. In such an event must the returning officer start the whole process again, i.e., must he order the bundles of tens to be untied, mixed again and sorted.? Paragraph 80 (page 74) of the *Pegawai Pengurus* expressly states that on a recount the whole process must start again from stage "C" — the sorting of ballot papers for each candidate and decisions on doubtful ballot papers. The petitioner no doubt strongly relies on this paragraph of the *Pegawai Pengurus*. For my part, I have no qualms in expressing my view that the *Pegawai Pengurus* is nothing but an administrative guidance to assist election officers in their work. It has not the force of law.

In my view since regulation 25(8) gives to the returning officer a discretion to order more than one recount in order to satisfy himself as to the correct result of the poll and since it is silent on the method to be adopted, it is quite plain that the legislaure intended to give to the returning officer a discretion in such matters. That being my considered view, has it been shown that he had exercised his discretion wrongly? I do not think so.

On the assumption that the returning officer erred in not following the procedure enumerated in the *Pegawai Pengurus*, has it been shown that non-compliance materially affected the result of the election? This is not a case for scrutiny, for scrutiny consists in ascertaining afresh whether some or all the ballot papers are valid or not. This is a case for a recount and for it to succeed it must be substantiated by specific instances and reliable *prima facie* evidence. This is clear from the well-known *Stepney Case*.[13] Where there is no proof, not even suspicion, of any irregularity in the counting of votes, there can be no justification for directing a recount. In *N. Pethu Reddiar* v. *V. A. Muthiah & Anor.*,[14] it was held that an election petitioner cannot claim for a recount only because in his petition he has prayed that on a proper counting of votes he would be the person to secure a majority of lawful votes. In *Tribeni Ram* v. *Satya Deo Singh*[15] it was held that directing a recount which could not have been for readjusting votes as a result of improper reception or rejection of votes but only for ensuring the correctness of the counting or of sorting, is in the discretion of the court. The whole basis of the present petitioner's case for a recount is that had there been a proper recount the unsuccessful candidate would be the person to win by a majority. These cases show that there is no justification for a recount solely on that ground.

Secondly, it is complained that the method of recount was done in a manner as a cashier does in a bank and that there was no opportunity given to the counting agent to scrutinize the votes except for the first two baskets that were involved in the hour of scrutiny. It is contended that there was an agreement between the unsuccessful candidate and the respondent that one counting agent should supervise one counting clerk. On one side of the table there were five counting clerks and on the opposite side were the counting agents. In pursuance of this agreement it is therefore said that only two counting clerks did the counting under the supervision of the candidates' respective agents while the other three counting clerks did not begin until the aforesaid two counting clerks had completed their counting. It was at that stage that eight votes in favour of the unsuccessful candidate were recovered from the respondent's bundle and from the unsuccessful candidate's own bundle nine votes in his favour were recovered in excess from the bundles of ten and from that the petitioner surmised that had there been a proper recounting he would have obtained a majority of lawful votes. He further said that while the recounting was going on upon the terms agreed to between the two candidates the returning officer returned to the scene and directed that the other three counting clerks should carry on counting simultaneously with the other two clerks otherwise the counting for the State seats would be held up.

As I have said earlier in my judgment, the petitioner's case rests solely on the evidence of the unsuccess-

ful candidate and his counting agent. The respondent quite naturally said that the counting was proper; there was no underhand dealing.

The onus is always on the person who asserts a proposition or fact which is not self-evident. If the court finds the evidence pro and con so evenly balanced that it can come to no conclusion, then the person on whom the onus lies has failed to prove his case. The returning officer and the counting clerks were not called to give evidence. Had this course been adopted, perhaps my view would be different from the one I am about to express.

On the evidence as it stands I find the case evenly balanced that I am unable to arrive at any conclusion at all and in the circumstances I hold that the petitioner's case based on the second limb has not been discharged.

The claim for a recount, instead substantiated by specific instances and reliable *prima facie* evidence, rests on nebulous allegations. This is but an attempt to fish out evidence to support the petitioner's case. There is no jusification for directing a recount. If the law were otherwise it will indeed lead to inconvenience. A defeated candidate in an unexceptionable election might harass the successful candidate by filing a frivolous petition and asking for a recount, involving thereby a repetition of the process of counting with no manifest advantage to anybody but himself.

*Order accordingly.*

Solicitors: *Lim Ewe Hock; Athi Nahappan & Co.*

**APPENDIX A**

*Report for Excuse of Corrupt or Illegal Practice under section 28 of the Election Offences Act, 1954 (Revised in 1969)*

**Raja Azlan Shah J.** (January 13, 1970): On the principle of extended scope of agency in election law I am satisfied that the respondent was by his agent Enche Kamaruddin bin Buyong guilty of corrupt practice under section 11(1)(c) of the Act in that the said agent caused the election handbills to be printed without having on their surface the names and addresses of its printers and publishers. I am also satisfied that the said Enche Kamaruddin bin Buyong was not the respondent's election agent.

Section 28 of the said Act gives power to the appropriate authority not to declare the said election void provided —

The Attorney-General was given an opportunity to be heard, by that I mean whether appropriate criminal proceedings would be instituted against the said respondent or any other person connected with the said election and that the candidate has proved to the satisfaction of the court —

(a) that no corrupt or illegal practice was committed at such election by the candidate or his election agent and the offences mentioned in the said report were committed contrary to the orders and without the sanction or connivance of such candidate or his election agent;

(b) that such candidate and his election agent took all reasonable means for preventing the commission of corrupt or illegal practice at such election;

(c) that the offences mentioned in the said report were of trivial, unimportant and limited character; and

(d) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents.

In those circumstances the election of such candidate shall not, by reason of the offences mentioned in such report, be void, nor shall the candidate be subject to any incapacity under this Act.

The Attorney-General's representative was heard and he was of the opinion that the offence of corrupt practice as committed in the present case was trivial and unimportant in the sense that he would have instituted proceedings against the person or persons concerned if it was otherwise. I associate myself with this view.

I further take the view that such offence has a limited character in that the offending cards were traced from the possession of the party workers and not from the voters. There is no evidence to indicate that such offending cards were distributed to the voters but only to assist the party workers in their work.

I am satisfied that the corrupt practice was not committed by the respondent or his election agent and that the said offence was committed contrary to his orders and without the sanction or connivance of such candidate. I have already indicated that finding on page 3 of my judgment (pp. 16 and 17, *supra*):

"I accept the respondent's words that he had given specific instructions that any advertisement, handbills, stickers and any other documents issued by the party must bear the printers' and publishers' name. The uncontroverted fact that all the party's publications, e.g. booklets, circulars and rubber-stamped documents bearing names and addresses of the printers and publishers is consistent with and lends support to the respondent's evidence. I further accept that the impugned cards were printed without his knowledge and consent and that he was indisposed prior to that date. Any subsequent knowledge of the publications cannot be relevant for the purpose of determining the consent of the candidate prior to the publication. He personally directed the destruction of the remaining copies which were in the office."

I am satisfied that the respondent and his election agent took all reasonable steps for preventing the commission of the corrupt practice. That is also indicated on page 3 of my judgment, which has been reproduced in the previous paragraph. I find that the electoral offence under section 3(m) of the said Act was not committed by the respondent or his election agent. That is indicated on pages 8 and 9 of my judgment (p. 18, *supra*):

"Section 3(m) enacts: 'Any person who prints any advertisement, handbill, placard or poster, which refers to an election and contains a reproduction of a ballot paper, or of what purports to be a ballot paper, to be used or likely to be used at such election shall be liable to imprisonment...'

It seems to me that the words 'Any person who prints' give the key to the true construction of the sub-section. That sub-section imposes a penal liability to any person who violates its provisions. Therefore, in accordance with the canon of statutory interpretation it must be strictly construed, that is, the language therein cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the Act as a whole was enacted. Applying this test it is plain that this particular sub-section was designed to enforce obedience to the mandates of the law by punishing the printers who disregard its provisions. It is specifically directed against the person who 'prints' but not against those who 'cause to be printed'. The manifest distinction between the language used in this section and that used in section 11 cannot also be overlooked.

On the evidence I am satisfied that the respondent did not print those offending cards. In my view, this ground is misconceived."

Finally I am satisfied that in all other respects the said election was free from any corrupt or illegal practice on the part of the respondent or his agents.

In the light of my findings I am satisfied that the mandatory provisions of section 28 of the said Act have been proved to my satisfaction and I therefore declare that the election is valid and that Tunku Abdullah was duly returned.

**APPENDIX B**

*Certificate under section 36 of the Election Offences Act, 1954 (Revised in 1969)*

**Raja Azlan Shah J.** (January 13, 1970): The petition was filed by a Gerakan voter against the successful candidate Tunku Abdullah. It was based on three specific grounds —

(1) that corrupt practice was committed by the respondent or his agents by causing the election handbills to be printed without bearing upon their surface the name and address of its printers and publishers, contrary to section 11(1)(c) of the Act;

(ii) that illegal practice was committed by the respondent or his agents by printing the said election handbills and/or advertisements which contained reproduction of what purports to be a ballot paper with the symbol of two political parties, contrary to section 3(m) of the said Act; and

(iii) that a recount be ordered.

I found the grounds (ii) and (iii) not proved by the petitioner. However, I found that an offence of corrupt practice by the respondent's agent Enche Kamaruddin bin Buyong was committed contrary to section 11(1)(c) of the Act.

In the circumstances and on the facts of the case and by invoking the provisions of section 28 of the said Act, I hereby certify that the respondent was duly returned.

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## S.D. RANI & ORS. v. JOHN PILLAI

**[O.C.J. (Syed Othman J.) January 22, 1970]**

**[Johore Bahru — Originating Summons No. 58 of 1969]**

*Advocates and Solicitors — Practitioner — Whether a legal assistant practising in Johore is a "practitioner" for the purpose of the Advocates and Solicitors Ordinance, 1947, ss. 39 & 40 — Entitlement to vote.*

*Advocates and Solicitors — Local Bar — Election — Voting rights — Practitioners — Maintaining an office.*

*Interpretation — Legislation — Provision capable of two meanings — "Maintain" — Meaning of.*

The applicants are advocates and solicitors employed in various firms of advocates and solicitors in Johore. They seek the determination of the question whether an advocate and solicitor employed as an assistant by a firm of advocates and solicitors in Johore is a practitioner within the meaning of section 39(2) of the Advocates and Solicitors Ordinance, 1947.

**Held:** a legal assistant practising in the State who is under the employ of a firm of practitioners practising and maintaining an office in a State is a practitioner for the purposes of section 39(2) of the Advocates and Solicitors Ordinance and consequently for the purpose of Part IV of the Ordinance.

*Case referred to:-*

(1) *Way* v. *Bishop* [1928] All E.R. Rep. 409.

ORIGINATING SUMMONS.

*J. J. Puthucheary* for the applicants.

*L. A. J. Smith* for the respondent.

*Ajaib Singh* (Senior Federal Counsel) and *K. A. Menon, amicus curiae.*

**Syed Othman J.:** In this originating summons, the applicants (Devika Rani Selvadurai, Upali Mascorale, H. L. Tennakoon and Hendon binti Haji Mohamed) who are advocates and solicitors, and employed in the various firms of advocates and solicitors in Johore, seek the determination of the question whether an advocate and solicitor employed as an assistant by a firm of advocates and solicitors in the State of Johore is a practitioner within the meaning of sub-section (2) of section 39 of the Advocates and Solicitors Ordinance, 1947 (which I shall refer to as the Ordinance).

They also seek a declaration that they should have been entitled to vote at the statutory annual general meeting of practitioners practising in the State of Johore held on 26th January, 1969.

Section 39 of the Ordinance reads: -

"39. (1) In this Part (i.e. Part IV of the Ordinance) —

'combined Bar' means all the practitioners in any two or more States who have combined under the provisions of section 41 of this Ordinance;

'Local Bar' means all the practitioners practising in a State or a combined Bar.

(2) For purposes of this Part of this Ordinance, a practitioner is deemed to be practising in a State if he or any practitioner with whom he is associated in partnership practices and maintains an office in such State:

Provided that, as regards the State of Johore, each practitioner who was a member of the Johore Bar on the 8th day of December, 1941, shall be deemed to be practising in the State of Johore whether or not he or any of his partners maintains an office in that State."

The events leading to this application are briefly as follows: The statutory annual general meeting of the Johore Bar was held on 26th January, 1969. The applicants and 36 other practitioners were present. The most senior practitioner present declined upon being called to preside over the meeting. Mr. John Pillai, the respondent and the next senior practitioner present, upon being called, presided over the meeting.

Mr. David Chelliah, an advocate and solicitor, then raised a preliminary point and requested the respondent to make a ruling on the interpretation of sub-section (2) of section 39 of the Ordinance. Mr. Chelliah interpreted the sub-section as having the effect that only principals who maintained an office in the State were eligible to vote and that assistants were not eligible to vote as they were not associated in partnership with the principals. There appears to have been some active discussion on the point raised.

The respondent then ruled that only principals who practised and maintained an office or who were associated in partnership with a practitioner who practised and maintained an office in Johore were entitled to vote but assistants were eligible to be elected to the committee.

After the ruling the meeting proceeded with its business. Office-bearers for the year were elected.

It would be interesting to note that towards the end of the meeting Mr. M. P. D. Nair requested the new committee to look into sub-section (2) of section 39 of the Ordinance with a view to amendments so that assistants had the right to vote; and that Dato' D. C. Jackson then raised the point that as assistants were not eligible to vote they should not be requested to pay their annual subscriptions.

Perhaps at this stage it would be necessary to examine as to how the respondent arrived at the ruling that only principals were eligible to vote but assistants were eligible to be elected to office.

As far as I can see, the ruling has been brought about by the wording of sub-sections (3) and (4) of section 42 of the Ordinance which provide: —